STATE OF MICHIGAN

COURT OF APPEALS

SELINA R. HENDERSON,

Plaintiff-Appellant,

v

VOLPE-VITO, INC.,
d/b/a FOUR BEARS WATER PARK,

Defendant-Appellee.

UNPUBLISHED
June 27, 2006

No. 266515
Macomb Circuit Court
LC No. 04-003387-NO

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals by right an order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Basic Facts and Procedure

Plaintiff, the owner of a small business, decided to sponsor a client/employee picnic at defendant's commercial recreation park. Plaintiff contracted with defendant for use of a picnic area, a tent, tables, and a grille. On July 19, 2003, the day of the picnic, plaintiff arrived at the assigned area and discovered the area heavily littered with what she thought were dog feces but which were actually goose feces. Plaintiff, family members and guests cleaned the area after a park employee failed to do so adequately.

Plaintiff, who was several months pregnant at the time of the picnic, sought emergency treatment on or about August 4 for a high fever and was admitted to Providence Hospital the following day. While still in the hospital, her child was born August 23, several months premature,[1] and she as discharged on August 27. A bone-marrow analysis of the plaintiff revealed the presence of histoplasmosis.[2] Plaintiff was twice more hospitalized that year for

[1] No injury to the child is alleged or at issue this case.

[2] A disease caused by inhaling spores from fungus that grows in soil enriched by bird or bat droppings.

extended stays. Plaintiff said she is under continued treatment for histoplasmosis and experiences ongoing fatigue, flaring of her lymph glands and had to close her business.

In dismissing plaintiff's complaint, the trial court determined that defendant did not know and had no reason to discover that fungus spores existed on defendant's property that could cause harm to plaintiff. Therefore, the trial court concluded defendant did not owe plaintiff a duty to protect her against inhaling the fungus spores and the resulting harm.

II. Analysis

On appeal, plaintiff claims, *inter alia*, that defendant owed her a duty to protect her against the condition of having the spores on his land. We disagree.

1. Standard of Review

This Court reviews de novo a trial court's decision whether to grant summary disposition. *Devillers v Auto Club Ins. Ass'n*, 473 Mich 562, 567; 702 NW2d 539 (2005). Under MCR 2.116(C)(10), a motion for summary disposition tests the factual support of the claim. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). When deciding a motion pursuant to MCR 2.116(C)(10), this Court must consider "the affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties . . .." MCR 2.116(G)(5). See *Auto Club Group Ins. Co. v. Daniel*, 254 Mich App 1, 3; 658 NW2d 193 (2002). "A trial court may grant a motion for summary disposition . . . if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

2. Defendant Did Not Owe Plaintiff A Duty To Protect Her From Fungus Spores

The threshold question in a negligence action is whether the defendant owed a duty to protect the plaintiff against the condition that caused the harm. *Fultz v Union-Commerce Assocs.*, 470 Mich 460, 463; 683 NW2d 587 (2004). "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997).

Initially, we resolve plaintiff's argument – raised for the first time on appeal – that defendant was negligent per se and, therefore, owed plaintiff a duty. Specifically, plaintiff is arguing before this Court that defendant violated a provision of MCL 289.1101, *et seq*., Michigan's Food Law, which proscribes "filthy or insanitary conditions to exist in a food establishment in which food intended for human consumption is manufactured, received, kept, stored, served, sold, or offered for sale." MCL 289.5101(1)(k).

An issue not presented to the circuit court for consideration is not preserved for appeal. *Polkton Charter Twp. v. Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). "This Court need not consider issues that have not been presented or preserved," *Royal Prop. Group, LLC v Prime Ins. Syndicate, Inc*., 267 Mich App 708, 720; 706 NW2d 426 (2005). However, this Court "may disregard the issue preservation requirements and review may be granted if failure to consider the issue would result in manifest injustice." *Polkton, supra*, at 95-96.

Even if the issue were preserved, our analysis does not persuade us that defendant owed plaintiff a duty under the statute.

In Michigan, "evidence of violation of a penal statute[3] creates a rebuttable presumption of negligence." *Klanseck v Anderson Sales & Service, Inc.*, 426 Mich 78, 87; 393 NW2d 356 (1986). The Court in *Klanseck* articulated three factors used to determine whether negligence per se would lie: (1) the statute being invoked must be intended to protect against the result of the violation; (2) the plaintiff is within the class intended to be protected by the statute; and (3) the evidence will support a finding that the violation was a proximate contributing cause of the occurrence. *Id*.

We conclude that defendant is not a "food establishment."[4] While the park had permanently attached grilles, plaintiff did not establish that defendant engaged in any of the statutorily enumerated actions, e.g., packing, canning, selling, etc., with regard to plaintiff. Additionally, defendant is not a "food service establishment."[5] In short, defendant's action of supplying plaintiff with a tent, tables, grille, and a picnic site does not put him into one of the categories within the act. We therefore conclude that plaintiff's claim fails to satisfy the test set forth in *Klanseck*, and plaintiff is not entitled to a presumption of negligence.

We also conclude defendant did not owe plaintiff a common law duty to protect her from the mold and spores made airborne by plaintiff's own conduct. In a premises liability case, the

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[3] The food law contains criminal penalties – e.g., imprisonment – for certain violations. See MCL 289.5107.

[4] (i) "Food establishment" means an operation where food is processed, packed, canned, preserved, frozen, fabricated, stored, prepared, served, sold, or offered for sale. Food establishment includes a food processing plant, a food service establishment, and a retail grocery. Food establishment does not include any of the following: (i) A charitable, religious, fraternal, or other nonprofit organization operating a home-prepared baked goods sale or serving only home-prepared food in connection with its meetings or as part of a fund-raising event. (ii) An inpatient food operation located in a health facility or agency subject to licensure under article 17 of the public health code, MCL 333.20101 to 333.22260. (iii) A food operation located in a prison, jail, state mental health institute, boarding house, fraternity or sorority house, convent, or other facility where the facility is the primary residence for the occupants and the food operation is limited to serving meals to the occupants as part of their living arrangement.

[5] "Food service establishment" means a fixed or mobile restaurant, coffee shop, cafeteria, short order cafe, luncheonette, grill, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, nightclub, drive-in, industrial feeding establishment, private organization serving the public, rental hall, catering kitchen, delicatessen, theater, commissary, or similar place in which food or drink is prepared for direct consumption through service on the premises or elsewhere, and any other eating or drinking establishment or operation where food is served or provided for the public. Food service establishment does not include any of the following: . . . (ii) A food concession . . ..

duty, if any, imposed on a landowner depends on the relationship between the landowner and the plaintiff. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "[I]nvitee status is commonly afforded to persons entering upon the property of another for business purposes." *Id* at 597. Given the terms of the contract between the parties here, plaintiff was defendant's invitee.

Invitee status implies a "representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Id*, quoting *Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987). "The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards."

Defendant here would be liable if defendant: (1) knew, or by the exercise of reasonable care should have known, about the existence of the danger; (2) should expect that plaintiff would not discover or realize the danger or would fail to protect herself against the danger; and (3) failed to exercise reasonable care to protect plaintiff from the danger. *Stitt*, *supra.* Plaintiff's argument fails on the first prong of the test.

Reviewing the facts a light most favorable to plaintiff, no genuine issue of material fact has been raised with respect to whether defendant knew or should have known about the existence of the fungus spores. As the trial court stated, plaintiff has not provided any evidence – direct or circumstantial – that defendant was aware of the hazard or that inspection of the premises would have led to its discovery. Put another way, no duty arises here because plaintiff has failed to provide any evidence to impute what defendant knew or should have known of the risk that mold spores would be released into the air on defendant's premises at the time of the alleged infection.

Plaintiff also argues that the trial court erroneously demanded direct evidence to show defendant knew or should have known about the spores and that the trial court ignored circumstantial evidence that would imply such knowledge. We find no merit to plaintiff's argument. First, plaintiff's reliance on *Comstock v General Motors*, 358 Mich 163; 99 NW2d 627 (1959), is misplaced.

Comstock was a product liability case, not a premises liability case. In *Comstock*, defendant manufactured cars with defective breaks. Here, defendant did not "manufacture" defective geese feces. Moreover, the *Comstock* Court's decision was based upon the defendant's admitted knowledge of the defective brake system. The Court reasoned the defendant's knowledge as a manufacturer gave rise to the duty to warn end users of the defect.

Furthermore, the geese feces did not cause plaintiff's ailment. Rather, the spores from fungus growing in ground enriched by the feces – and then stirred up – are alleged to have caused plaintiff's ailment. Unlike the defendant in *Comstock*, defendant here does not admit to any prior knowledge of the fungus – only to prior knowledge of the geese. Plaintiff would like defendant's knowledge of the geese and their feces to attenuate into an implied knowledge of the fungus, the spores and the dangerous condition of defendant's land. We decline to do so.

Plaintiff also points to a list of facts and argues they should be read to imply, as circumstantial evidence, that defendant knew or should have known of the alleged dangerous condition posed by the presence of the fungus and its spores. Specifically, plaintiff states: The CDC's view that fungus spores are ubiquitous in the central United States; that numerous geese frequented the picnic area; that defendant's employees admitted the geese's droppings were not cleaned up; that the fungus spores are airborne and that the picnic occurred on a windy day; and that the open-sided tent supplied by defendant afforded plaintiff no protection against the spores.

Accepting all facts as true, plaintiff's argument nonetheless fails. Such evidence is only apparent in hindsight, and is therefore of dubious value. See *Anderson v Pine Knob Ski Resort, Inc*., 469 Mich 20, 40; 664 NW2d 756 (2003), where our Supreme Court opposes a hindsight approach to determine foreseeability.

Because defendant prevails on the issue of legal duty, we decline to address the other issues raised on appeal.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio